Tentative Rulings for October 23, 2014
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

14CECG01113 ***Johnson v. Lovejoy*, (Dept. 503)**

13CECG02214 ***West America Bank v. Bakhashish, Inc*. (Dept. 503)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

03 **Tentative Ruling**

Re: ***619, LLC v. Pink Palace Beauty Supply and Salon, LLC***
Case No. 14CECG00085

Hearing Date: October 23rd, 2014 (Dept. 402)

Motion: Plaintiff's Motion to Deem Documents Genuine and Requests Admitted, and for Monetary Sanctions

Tentative Ruling:

To deny the motion to deem the genuineness of the documents and the truth of the matters in the requests for admission to be admitted. (Code Civ. Proc. § 2033.280.) To deny both parties' requests for sanctions against the other party. (*Ibid*.)

Explanation:

With regard to the motion to deem the truth of the matters in the requests for admission (RFA's) admitted, while it appears that defendant failed to respond to the RFA's within 35 days of service of the RFA's, defense counsel claims that he never received the RFA's and thus he did not know responses were necessary. Even assuming that defense counsel did fail to respond to the RFA's, he served responses after being served with the motion, which is enough to cure the initial failure to respond.

Under Code of Civil Procedure section 2033.280, if the responding party fails to respond to the RFA's within the statutory time period, "The requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted, as well as for a monetary sanction…" (Code Civ. Proc. § 2033.280, subd. (b).) "The court shall make this order, **unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Section 2033.220**." (Code Civ. Proc., § 2033.280, subd. (c), emphasis added.)

Here, defendant served responses to the RFA's prior to the hearing on the motion, so the court intends to deny the motion to deem the RFA's as moot.

Also, to the extent that plaintiff seeks monetary sanctions against defendant for its failure to serve timely responses, the court intends to deny the request. As discussed above, defense counsel claims that he never received the RFA's and that he did not know any such requests were pending until he was served with the motion. Thus, it appears that his failure to respond was justified, and there was no willful failure to respond to discovery.

Finally, defense counsel's request for $1,400 in sanctions against plaintiff and its counsel is also denied. It does not appear that there is any basis for such sanctions here. While defense counsel claims that the motion was brought in bad faith, it seems equally likely that plaintiff's counsel served the RFA's on June 25th as she represents in her declaration, and when she failed to receive responses, she brought her motion in good faith. Plaintiff's counsel was not required to meet and confer before filing the motion, since there is no such requirement in section 2033.280. While meeting and conferring might have avoided the present motion, the lack of meet and confer efforts does not necessarily show bad faith. It appears that the motion was justifiable under the circumstances, and therefore the court will not impose sanctions against plaintiff or her counsel.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/22/2014 .
(Judge's initials) (Date)

(5) **Tentative Ruling**

Re: ***Victor Woodley, a minor, through his GAL v. Jordan McAllaster***
Superior Court Case No. 14CECG01945

Hearing Date: October 23, 2014 **(Dept. 402)**

Motion: Demurrer to the Original Complaint

Tentative Ruling:

To overrule. An Answer must be filed within ten days of notice of the ruling. The time in which the complaint can be answered will run from service by the clerk of the minute order. An Answer is to be filed within ten days of notice of the ruling.

Explanation:

Background

On September 11, 2013, Plaintiff, a student at Clovis West High School and Defendant, apparently another student, were participating in a physical education class involving "touch" football. Plaintiff was playing quarterback. During a play, Defendant rushed him, wrapped him in his arms and threw him to the ground breaking his collarbone. On July 10, 2014, Plaintiff through his GAL, filed a judicial form complaint alleging a single cause of action for negligence.

On September 19, 2014, the Defendant filed a general demurrer on the grounds that insufficient facts are stated. Opposition and a reply were filed.

The Demurrer

In an extensive discussion, the Defendant argues that the doctrine of assumption of the risk applies. See Defendant's Memorandum of Points and Authorities at pages 2-13. Assumption of the risk is an affirmative defense. See *Cal. Prac. Guide Civil Procedure Before Trial Claims & Defenses* (Hon. Rebecca A. Wiseman and Sara Church Reese) Chapter 6 "Negligence" at ¶ 625: "*Primary* assumption of the risk *relieves defendant of any duty* to plaintiff. The **defense** applies when plaintiff is injured due to a risk that is *inherent* in plaintiff's job or in an activity in which plaintiff chose to participate. [*Knight v. Jewett* (1992) 3 Cal.4th 296, 308; *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154; 6 Witkin, Summary of California Law, Torts §§ 1281–1294, 1336–1356; Rest.2d Torts § 496B] [Boldface added and alternative citations omitted]"

In its Memorandum of Points and Authorities, the Defendant cites *Kahn v. East Side Union High School District* (2013) 31 Cal.4th 990, *Knight v. Jewett* (1992) 3 Cal.4th

296, *Fortier v. Los Rios Community College District* (1996) 45 Cal.App.4th 430; *Avila v. Citrus Community College District* (2006) 38 Cal.4th 148; *Lilley v. Elk Grove Unified School District* (1998) 68 Cal.App.4th 939; *Hemady v. Long Beach Unified School District* (2006) 143 Cal.App.4th 566 and *M.W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal.App.4th 508 in support. But, the latter case is completely distinguished because it involved a sexual assault upon a junior high school student. Except for *Avila*, supra, the remaining cases are distinguished in that they went up on appeal after the entry of summary judgment. The application of the particular facts of each case (obviously obtained through discovery) was paramount to each decision.

Avila went up on appeal after a judgment was entered upon the sustaining of a demurrer without leave to amend. But, *Avila* is distinguished because the plaintiff, a young adult, was participating in a game of intercollegiate baseball. He was struck by a pitch allegedly in retaliation for his team's pitcher hitting one of the home teams' batters. His helmet cracked. His own manager and coaches allegedly failed to take him out of the game. He was allegedly given no first aid. He suffered injuries as a result. He sued both colleges, his manager, the helmet manufacturer and various other entities and organizations. Only the claims against Citrus Community College District (the opposing team) were examined via demurrer. The Supreme Court held inter alia that no duty was owed under the doctrine of primary assumption of the risk. Id. at 164-165.

Here, the Plaintiff, a minor, was not hit by a "bean ball" while participating in an intercollegiate sport. More importantly, through this demurrer, Defendant asks the Court to examine a 5 sentence paragraph (Complaint at ¶ GN-1) and hold that the affirmative defense of assumption of the risk bars any cause of action. But, the Court does not have enough facts to make this determination. Ultimately, whether assumption of the risk, an affirmative defense, applies is far more suited to a motion for summary judgment than a demurrer to an original complaint. Therefore, the demurrer will be overruled.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/22/2014 .
(Judge's initials) (Date)

Tentative Rulings for Department 403

(20) **Tentative Ruling**

Re: ***Hopkins v. Johnson***
Superior Court Case No. 14CECG02931

Hearing Date **October 23, 2014 (Dept. 403)**

Motion: Petitions to Compromise Minors' Claims

Tentative Ruling:

To grant. Order Approving Compromise signed. Hearing off calendar. No appearances necessary.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 10/21/2014.
(Judge's initials) (Date)

(23) **Tentative Ruling**

Re: ***Lorena Nayeli Herrera Colin, et al. v. Jesus Flores Zavala, et al.***
Superior Court Case No. 12CECG02662

Hearing Date: Thursday, October 23, 2014 (**Dept. 403**)

Motions: Two Petitions to Compromise a Minor's Claim

Tentative Ruling:

To TAKE OFF CALENDAR since Petitioner failed to file amended petitions, with appropriate supporting papers and proposed orders, for both minors at least 10 court days prior to the hearing date. (Super. Ct. Fresno County, Local Rules, rule 2.8.4, subd. (A).) Petitioner must obtain a new hearing date for consideration of any amended petitions.

Explanation:

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 10/22/2014.
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Centex Real Estate Corp. v. Air Design***
Case No. 13CECG02452

Hearing Date: October 23, 2014 (Department 403)

Motion: plaintiff's demurrer to First Amended Answer

Tentative Ruling:

To deny and to deny all requests for sanctions.

Explanation:

The subpoena was served on the deponent at 2125 Ygnacio Valley Road in Walnut Creek. The amended deposition notice and the moving papers were served on 125 Ygnacio Valley Road. The opposition and the reply papers omitted the deponent entirely from the service list. Also omitted are the objections admittedly made by the deponent. There is no separate statement as required by California Rules of Court, Rule 3.145.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 10/22/2014.
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Becerra v. McClatchey Company***
Case No. 08CECG04411

Hearing Date: October 23, 2014 (Department 403)

Motion: by plaintiffs for reconsideration of bifurcation ruling.

Tentative Ruling:

To grant reconsideration. To affirm bifurcation ruling.

Explanation:

1. Timeliness of Motion

The pertinent part of CCP section 598 states that an order of bifurcation may be made "no later than the close of pretrial conference in cases in which such pretrial conference is to be held, or, in other cases, no later than 30 days before the trial date." The "trial readiness" conference in this case is on October 31, 2014. A full discussion of the trial readiness conference is found at Fresno County Superior Court Rules, Rules 2.6.1. CCP section 575 permits the Judicial Council to set rules for pretrial conferences.

A review of trial court rules in California shows that the "pre-trial" conference in other courts is the same as the "trial readiness" conference in this Court, where the parties submit in limine motions, lodge and exchange of pre-marked exhibits, witness lists, and jury instructions. See, e.g., Alameda County Superior Court Rules, Rule 3.35 ("Standing Pretrial Orders), Mono County Superior Court Rules, Rule 4.8, and Inyo County Superior Court Rules, Rule 6.15. Further, where the word "pretrial" now appears with regard to civil trials in the California Rules of Court, it references just such an exchange and pertains to a conference taking place very close to the trial. See Rule 3.1548. This motion is timely in light of the date of the Trial Readiness Conference.

Exhibit 2 to plaintiffs' filing shows that the parties were in agreement on seeking bifurcation differing only as to the extent. There was no actual motion filed. Each party essentially applied to the Court for a particular form of bifurcation. In that scenario, a change of law permits reconsideration upon the request of either party, without any time limit. See Code of Civil Procedure section 1008(b). A change of law also permits the Court to reconsider any time it wants. Code of Civil Procedure section 1008(c).

There has been a change in law here, and reconsideration is appropriate.

2. Prior Bifurcation Rule is Valid

This Court previously found that the issue of liability under Business and Professions Code section 17200 for breach of Labor Code section 2802 should be tried first along with the question of employee/independent contractor status. The Court finds that such bifurcation remains appropriate. *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal. 4th 522 stands for the proposition that the question to be decided to determine employee/independent contractor status is the hirer's right to control, and that exercise of control or lack thereof in individual worker situations is not relevant. Plaintiffs' trial plan is to submit evidence generated by the defendants and their managers to show defendants' retention of the right to control certain aspects of carrier work.

Defendants appear to plan to provide testimony from individual workers as to their personal experience of defendants' exercise of control. Such evidence might be of questionable value in answering the "right to control" question. *Duran v. U.S. Bank National Association* (2014) 59 Cal. 4th 1 notes that if a series of witnesses is to be called as proof of a company policy, such series of witnesses need be randomly chosen and there must be scientific evidence showing the statistical validity of the witness sample. However, such issues are more properly considered via motions in limine.

As to the reimbursement question, liability to a class under Business and Professions Code section 17200 (the Unfair Competition Law or UCL) is easier to show than liability under the actual statute. A showing that every single person did not get paid is not necessary. Only the class representative needs to show actual harm, such a loss of money or property, pursuant to Proposition 64. See *In Re Tobacco II Cases* (2009) 46 Cal. 4th 298, 320 (citations omitted, italics in original):

> "[T]he language of section 17203 with respect to those entitled to restitution—'to restore to any person in interest any money or property, real or personal, which *may have been acquired*' . . . by means of the unfair practice—is patently less stringent than the standing requirement for the class representative— 'any person who has suffered injury in fact and has lost money or property *as a result of* the unfair competition.' (Section 17204) . . . This language, construed in light of the concern that wrongdoers not retain the benefits of their misconduct led courts repeatedly and consistently to hold that relief under the UCL is available without individualized proof of deception, reliance and injury. Accordingly, to hold that the absent class members on whose behalf a private UCL action is prosecuted must show on an individualized basis that they have 'lost money or property as a result of the unfair competition' (Section 17204) would conflict with the language in section 17203 authorizing broader relief—the 'may have been acquired' language—and implicitly overrule a fundamental holding in our previous decisions . . ."

For liability purposes, all that need be shown is that the Bee "may" have failed to make proper reimbursement, and that can be shown by Bee practices overall. There are no damages awardable under the UCL, Business & Professions Code section

17200. All that can be awarded is restitutionary and injunctive relief, and injunctive relief does not require a showing that each class member was denied reimbursement

> "The general equitable principles underlying section 17535 as well as its express language arm the trial court with the cleansing power to order restitution to effect complete justice. Accordingly the statute authorizes a trial court to order restitution in the absence of proof of lack of knowledge in order to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains."
>
> *People v. Fremont Life* (2002) 104 Cal. App. 4th 508, 531.

The question of liability under the UCL requires no proof of individual right to restitution, and it is therefore appropriately tried with the employee/independent contractor question. Both questions look to the defendants' procedures and policies rather than individual carrier experience with those procedures and policies.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 10/22/2014.
(Judge's initials) (Date)

Tentative Rulings for Department 503

03 **Tentative Ruling**

Re: ***Almack v. Supportive Services, Inc.***
Case No. 14CECG00474

Hearing Date: October 23rd, 2014 (Dept. 503)

Motion: Defendant Ameripride Services' Demurrer to First Amended Complaint

Tentative Ruling:

To overrule Ameripride's demurrer to the first amended complaint. (Code Civ. Proc. § 430.10(e), (f).) To order Ameripride to file its answer within 10 days of the date of service of this order.

Explanation:

Defendant Ameripride demurs to both causes of action and all the separate counts of the second cause of action, arguing that the claims are uncertain or fail to state facts sufficient to constitute a claim against Ameripride because there are no allegations that Ameripride owned, possessed, leased or controlled the premises on which the accident occurred.

"Premises liability is a form of negligence based on the holding in *Rowland v. Christian*, and is described as follows: The owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm. A failure to fulfill this duty is negligence." (*Brooks v. Eugene Burger Management Corp*. (1989) 215 Cal.App.3d 1611, 1619, internal citations omitted.)

"Modern cases recognize that after *Rowland*, the duty to take affirmative action for the protection of individuals coming upon the land is grounded in the possession of the premises and the attendant right to control and manage the premises." (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 368, internal citations omitted.)

Here, contrary to the defendant's contention, the plaintiff has alleged that defendants Supportive Services and Does 1 to 2 "negligently owned, maintained, managed and operated the described premises." (First Amended Complaint, p. 5, Prem. L-2.) Also, in the general negligence cause of action, plaintiff alleges that Supportive Services and Does 1 to 10 caused his injuries by positioning the floor mat negligently and dangerously, causing plaintiff to fall. (FAC, p. 4, GN-1.) While these allegations are somewhat conclusory, they are sufficient to state the basic element of possession, ownership, management or control of the premises, as well as the existence of a duty, breach of that duty, causation and resulting damages. It would not be

reasonable to require plaintiff to allege more specific facts at this stage of the proceeding, since plaintiff may not have detailed information about the nature of Ameripride's ownership, management, possession, or control at this time. The parties can use the discovery process to learn the specifics of the defendant's control over the property.

Also, while Ameripride denies in its demurrer that it had any ownership, possession, or right of control over the property, a demurrer is not the proper vehicle to rebut plaintiff's properly pled factual allegations. The court must assume that all properly pled facts in the complaint are true for purposes of a demurrer, and the court cannot consider any extrinsic evidence when ruling on the demurrer. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881.) Thus, the court will not consider Ameripride's contention, which in any event is unsupported by any evidence, that it did not own, manage, lease, possess or control the premises.

Finally, while Ameripride claims that the first cause of action for negligence is uncertain because it is unclear which defendant caused the floor mat to be improperly positioned, the cause of action is not so ambiguous or vague as to be fatally uncertain. Demurrers for uncertainty are disfavored, and the court should not sustain a demurrer for uncertainty unless the complaint is so poorly alleged that it is impossible for the defendant to determine what it is supposed to have done wrong or what defenses to raise. (*Khoury v. Maly's of California, Inc*. (1993) 14 Cal.App.4th 612, 616.) Here, plaintiff has alleged that Supportive Services and Does 1 to 10 were negligent in maintaining the premises by allowing the floor mat to be positioned dangerously, thus causing plaintiff to fall and injure himself. (FAC, p. 4, GN-1.) In light of the allegation that Doe 1 (now Ameripride) was one of the owners, lessees, managers, possessors or controllers of the premises, it is reasonably clear that plaintiff is alleging that both Supportive Services and Ameripride were negligent in maintaining the premises and allowing the floor mat to be positioned in such a way as to cause plaintiff to fall. Thus, the first cause of action is not uncertain, and the court intends to overrule the demurrer.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 10/21/14.
(Judge's initials) (Date)

(23) **Tentative Ruling**

Re: ***Zachary Herr, et al. v. Sam Lane Dow, et al.***
Superior Court Case No. 13CECG02083

Hearing Date: Thursday, October 23, 2014 (**Dept. 503**)

Motion: Petition to Compromise a Minor's Claim

Tentative Ruling:

To DENY WITHOUT PREJUDICE. Petitioner must file an amended Petition, with appropriate supporting papers and proposed orders, and obtain a new hearing date for consideration of the amended Petition. (Super. Ct. Fresno County, Local Rules, rule 2.8.4.)

Explanation:

Since the Claimant's claim is the subject of a pending action, the heading of the Petition must be marked as a Petition to Approve Compromise of Pending Action, not a Petition to Approve Compromise of Disputed Claim.

While Petitioner provides the street and residence number of Claimant's address at Petition 2a, Petitioner has failed to provide the city, state, and zip code of the address.

While Petitioner states that Claimant is currently 16 years of age, based on the birthdate given at Petition 2b, the Court calculates that Claimant is actually 17 years old.

While Petitioner states that she is the Claimant's parent at Petition 3a, she is also the Claimant's guardian ad litem. Petitioner must mark the box located at Petition 3b.

Petitioner has failed to present an original or a photocopy of all doctors' reports containing a diagnosis of and prognosis for the Claimant's injuries and a report of the Claimant's present condition as Attachment 9. (Petition 9.)

While Petitioner is supposed to list all defendants who have agreed to settle with Claimant and the amounts that each defendant is offering to pay at Petition 11b, in this case, Petitioner states that one of the settling defendants is "Ureka Herr (Horace Mann Insurance – Medical Payments)[.]" However, Ureka Herr is a named plaintiff in the pending lawsuit, not a named defendant. Further, it appears that the $5,000.00 "settlement" is the medical payment portion of Claimant's father, Ureka Herr's, own insurance. As such, this $5,000.00 is not offered in compromise of the pending action and should not be included as part of the settlement.

While Petitioner is supposed to state the terms of the settlement at Petition 11c, instead Petitioner simply states: "tax free structured annuity, see Attachment 19(b)(3)[.]"

However, what Petitioner wants to do with the balance of the settlement proceeds is not the terms of the settlement between Claimant and Defendants Sam Lane Dow and Fred Dow. Petitioner must provide the terms of the settlement at Petition 11c.

There are three problems with Petition 13. First, Petitioner states that there is a total of $1,776.49 of outstanding medical expenses to be paid from the settlement proceeds. However, Petitioner has failed to list any medical service provider or providers who have outstanding medical charges that will be paid from the settlement proceeds at Petition 13b(5)(a) & 13b(5)(b). Therefore, it appears to the Court that there are no outstanding medical bills to be paid from Claimant's settlement proceeds.

Second, Petitioner has incorrectly calculated the negotiated reduction agreed to by the ERISA self-funded insurance plan that paid some of Claimant's medical expenses. Since the plan paid $43,017.85 and has agreed to accept a total reimbursement of $36,946.58, the amount of the negotiated reduction is $6,071.27, not $36,946.58. (Petition 13b(2)(f)(ii)(B).)

Third, Petitioner has failed to list the reimbursement owed to the ERISA self-funded insurance plan at Petition 13a(3).

While Counsel requests that the Court approve $171,864.00 in attorney's fees at Petition 14a and admits that she does have an agreement with Petitioner for services provided in connection with the claim giving rise to this Petition at Petition 18a(2), Counsel has failed to attach a copy of the agreement with Petitioner as Attachment 18a as required by Petition 14a and 18a(2).

There are several issues with the list of additional items of expense to be reimbursed from Claimant's settlement proceeds at Petition 14b. First, the amount listed in the total box at Petition 14b should be the total amount of all expenses sought to be reimbursed regardless of whether the particular expense is listed at Petition 14b or in Attachment 14b.

Second, the Court declines to allow the reimbursement of costs for copies, postage, fax, phone, travel, and investigation without a written agreement with Petitioner providing for the reimbursement of such costs.

Third, Petitioner requests reimbursement of $164.55 for a "lawsuit filing fee." However, given that there are three plaintiffs, the Court determines that Claimant should only be responsible for one-third of the $435.00 initial filing fee, or $145.00.

Fourth, Petitioner requests reimbursement of $429.00 for "process service." However, the proofs of service of summons filed with the Court indicate that the fee for serving Defendant Fred Lane Dow was $69.15 and the fee for serving Defendant Sam Lane Dow was $113.10. Therefore, the total process server fees were $182.25. Since there are three plaintiffs, the Court determines that Claimant should only be responsible for one-third of $182.25, or $60.75.

At Petition 15b(1), Petitioner states that she paid $975.91 of Claimant's medical expenses listed in Petition 13 for which reimbursement is requested. However, Petitioner has failed to state that she paid $975.91 of Claimant's medical expenses at Petition 13b(1). In fact, the $975.91 requested to be reimbursed to Petitioner does not appear to be stated anywhere in Petition 13 at this time. Additionally, any amount listed at Petition 13b(1) must be included in the total amount of payments to be reimbursed from proceeds at Petition 13a(3).

In order to protect the Claimant's best interests, the Court requires Counsel to request the following additional order at Petition 21 and Order Approving Compromise 12: "The payments called for under the single-premium deferred annuity cannot be accelerated, deferred, increased, nor may the minor anticipate, sell, transfer, assign, or encumber any of the said annuity payments upon achieving majority or otherwise."

Since there is a pending action, the heading of the Order Approving Compromise must be marked as an Order Approving Compromise of Pending Action, not an Order Approving Compromise of a Disputed Claim.

Petitioner failed to state the hearing date, time, department number, and name of the judicial officer at Order Approving Compromise 2b and 2c.

While Petitioner is Claimant's guardian ad litem, Petitioner failed to mark Order Approving Compromise 3b.

Since "Does 1-20, inclusive" are fictitious defendants who have not agreed to pay any settlement to Claimant, Petitioner has improperly listed "Does 1-20, inclusive" at Order Approving Compromise 5.

There are two problems with Order Approving Compromise 7c(1)(c). First, Petitioner has improperly listed her request for reimbursement of $975.91 that she paid for Claimant's medical expenses at Order Approving Compromise 7c(1)(c)(ii). However, Petitioner's request for medical expense reimbursement should be included in the amount listed at Order Approving Compromise 7c(1)(b).

Second, on Attachment 7c(1)(c), Petitioner requests payment of medical expenses to Community Regional Anesthesia, American Ambulance, and Community Regional Medical Center. However, these medical providers and the amounts sought to be paid to them are not listed anywhere in the Petition.

Petitioner has both marked Order Approving Compromise 9b and attached Attachment 9c. If Petitioner wishes to continue to mark Order Approving Compromise 9b, then Attachment 9c is improper as Attachment 9c should only be attached if Order Approving Compromise 9c is marked. If Petitioner wishes to continue to attach Attachment 9c, then the Petitioner should mark Order Approving Compromise 9c, not Order Approving Compromise 9b.

Petitioner has failed to provide a response at Order Approving Compromise 10.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 10/21/14.
(Judge's initials) (Date)

(27) **Tentative Ruling**

Re: **Singh v. Singh**
Court Case No. 12CECG03754

Hearing Date: **October 23, 2014 (Dept. 503)**

Motion: Defendant's motion for summary judgment, or, alternatively summary adjudication

Tentative Ruling:

To Deny.

Explanation:

"'Summary judgment is granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" (*Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 713, quoting § 437c, subd. (c).) Essentially, "[i]f a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered." (*McCaskey v. California State Auto. Assn.* (2010) 189 Cal.App.4th 947, 975.)

In determining whether any triable issues of material fact exist, the court must strictly construe the moving papers and liberally construe the declarations of the party opposing summary judgment. Any doubts as to whether a triable issue of material fact exist are to be resolved in favor of the party opposing summary judgment. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

Moreover, "a plaintiff cannot obtain judgment on a breach of contract cause of action in an amount of damages to be determined later." (*Paramount Petroleum Corporation v. Superior Court* (2014) 227 Cal.App.4th 226, 241; see also *Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1088 at1097.)

Here, in light of the disputed agreement as to how to apply the $30,000, the plaintiff cannot currently establish the amount of damages – an element to a breach of contract cause of action. (*Richert v. General Ins. Co. of America* (1968) 68 Cal.2d 822, 830.) A single material fact will defeat a summary judgment motion. (*Versa Technologies, Inc. v. Superior Court* (1978) 78 Cal.App.3d 237, 240.) Accordingly, the motion for summary judgment, or, alternatively summary adjudication, is denied.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 10/21/14.
(Judge's initials) (Date)

(5) **Tentative Ruling**

Re: ***Thao et al. v. Chevy Chase Bank et al.***
Superior Court Case No. 09CECG04134

Hearing Date: October 23, 2014 **(Dept. 503)**

Motion: By Defendant Assured Financial Corporation to Dismiss for Failure to Timely Serve Summons

Tentative Ruling:

To grant the motion pursuant to CCP § 583.210(a). The action is dismissed without prejudice.

Explanation:

Background

On or about February 12, 1999, Plaintiffs purchased a 19.71 acre parcel located at 14715 E. Dakota Avenue in the County of Fresno. The APN for this parcel was 309-040-70. However, a 30 easement for ingress and egress was also located on the parcel. On June 7, 2000 Plaintiffs obtained a Certificate of Waiver of Parcel Map. This created two parcels—one for agricultural use and one for residential purposes. Plaintiffs contend that the Certificate provided that the creation of the Residential Parcel was for the purpose of financing that parcel only and that it could be separated from the property as a whole by foreclosure. Each parcel was given a separate legal description and two new APNs. The Ag Parcel was designated APN 309-040-83. The Residential Parcel was designated as APN 309-040-82. According to the Plaintiffs, the original APN for the combined parcels no longer exists.

Thao re-financed the Residential Parcel three times between 2001 and 2004. It was then re-financed a fourth time on February 23, 2005 with Sierra Pacific Mortgage Company. As was the case with the other re-financings, a Deed of Trust secured the loan. For the last re-financing, Moyang Thao was required to deed her interest in the Residential Parcel to her spouse, Chialee Thao. An error occurred during the transfer and the old APN for the undivided parcel was used. Thao alleges that she did not realize the error because English is her second language and she is not sophisticated in business matters.

On or about March 1, 2005 the lender had the Residential property appraised. This appraisal used the correct APN and determined that the value of the parcel was sufficient to support a loan of $425,000.

A preliminary Title Report was issued by First American Title that covered the two acre Residential parcel. The preliminary report used the correct APN for the Residential parcel but used the legal description for the original 19.7 acre parcel. This incorrect legal description along with the correct APN was used on the Deed of Trust that was recorded for the last re-financing. The loan was later sold to U.S. Bank with servicing provided by Chevy Chase Bank.

On July 19, 2008 Capital One, the Successor by merger to Chevy Chase Bank commenced foreclosure proceedings. Due to the inaccuracies, the Ag parcel was foreclosed upon as well. Although Thao notified Capital One of the mistake, it was not corrected. Despite recording a lis pendens for both parcels on November 10, 2009, Capital One sold the entire 19.7 acre parcel at a Trustee's Sale on January 26, 2010 to Tony Vang, Mai Xiong and Tvic Chang. Assured Financial Corporation loaned the purchasers Vang, Xiong and Chang the sum of $310,766 to purchase the property.

On November 10, 2009 Plaintiffs filed a Complaint. As stated supra, on December 1, 2009 a lis pendens was filed. On February 17, 2012 an ex parte application was granted that permitted the Plaintiffs to file a First Amended Complaint. It alleged causes of action to quiet title, conversion, trespass and declaratory relief. All Defendants have filed Answers to the First Amended Complaint. Vang, Xiong and Chang have filed a Second Amended Cross-Complaint against U.S. Bank National Association as Trustee for Libor Series 2005-3, Family Lending Center dba Realty Marketing; Marcus Avalos; Capital One Bank and Gary Pamma aka Gurjit Pamma, London Properties and Katherine Williams-Straps.

On January 3, 2014 Plaintiff named Assured Financial as Doe 5. On February 11, 2014, proof of substituted service was filed showing that after substituted service, the summons, complaint, etc. were mailed on February 5, 2014. On March 13, 2014, Assured Financial filed a demurrer to the First Amended Complaint. On May 15, 2014, the demurrer on grounds of laches was overruled. The general demurrer to the third cause of action was overruled. The general demurrers to the sixth and seventh causes of action were sustained **without** leave to amend. The special demurrer for uncertainty to the eighth cause of action was sustained with leave to amend.

On August 28, 2014, Assured Financial filed a motion to dismiss for failure to serve the summons and complaint within 3 years as required by CCP § 583.210(a). Opposition and a reply were filed.

Service--Mandatory 3 Year Period

The periods for service run from the "commencement of the action." This means the *time the complaint is filed.* [CCP § 583.210(a); see *Bishop v. Silva* (1991) 234 Cal.App.3d 1317, 1327] An action is "commenced" when the original complaint is filed against the defendants named therein. Therefore, the 3–year period for service and filing proof of service runs from that date, rather than from the date of any later amended complaint (even if the amended complaint is the only one served). [CCP § 411.10; *Perati v. Atkinson* (1964) 230 Cal.App.2d 251, 253–254] The above rule applies even where the defendant seeking dismissal was served as one of the "Doe"

defendants named in the original complaint, which was later amended to show his true name. Because "Doe" was named in the **original complaint**, the 3–year period for service and filing proof of service of summons runs from the date it was filed. [*Lesko v. Sup.Ct. (Lopez)* (1982) 127 Cal.App.3d 476, 484–485—original complaint named *only* "Doe" defendants to stop running of statute of limitations]

Grounds for Tolling

The opposition argues that time should be excluded from the 3 year period pursuant to CCP § 583.240(d)—service is impossible, impracticable, or futile due to causes beyond the plaintiff's control. The law states that the statutory periods are also tolled where service of process has been ordered *stayed*, or is for any other reason "impossible, impracticable or futile" due to causes beyond plaintiff's control . . . except that failure to discover relevant evidence is no excuse. [CCP § 583.240(b),(d)] The "impossibility, impracticability or futility" excuses are strictly construed. [See *Bishop v. Silva* (1991) 234 Cal.App.3d 1317, 1321–1324 and see *Torrey Hills Community Coalition v. City of San Diego* (2010) 186 Cal.App.4th 429, 436] Plaintiffs claiming "impracticability" must show reasonable diligence in attempting to locate and serve defendant throughout the statutory period. [*Adelson v. Hertz Rent–A–Car* (1982) 133 Cal.App.3d 221, 227 (disapproved on other grounds in *Watts v. Crawford* (1995) 10 Cal.4th 743 at 759)]

Ruling

The statute specifically provides that "(f)ailure to discover relevant facts or evidence is not a cause beyond the plaintiff's control . . ." [CCP § 583.240(d)] Thus, delay between filing of the complaint and service on defendant is not excused by the attorney's investigations or attempts to procure evidence. [*County of Los Angeles v. Sup.Ct. (Quintero)* (1988) 203 Cal.App.3d 1205, 1209] Similarly, Plaintiff's failure to discover the true identity or facts showing the liability of an unserved "Doe" defendant was not a sufficient excuse for delay in service of summons on the real defendant. [*Republic Corp. v. Sup.Ct. (Delfino)* (1984) 160 Cal.App.3d 1253, 1256]

Here, Plaintiffs assert that at the time the original complaint was filed, the U.S. Bank had not yet sold the Residential Parcel to the Vang Defendants and as a result, the Vang Defendants had not obtained financing from Assured. Plaintiffs served the Vang Defendants as Does via substituted service on March 9, 2012. But, this does not explain why the Plaintiffs waited until on or about February 5, 2014 to serve Assured Financial. In fact, only a Memorandum of Points and Authorities was filed in opposition. Thus, no competent, detailed, factual declarations were submitted. This is required. See *Trailmobile, Inc. v. Sup.Ct. (Bell)* (1989) 210 Cal.App.3d 1451, 1456.

As the reply asserts, it was the decision of the Plaintiffs to serve both the Vang Defendants and Assured as Does. It also argues that the sale of the property on January 26, 2010 was recorded. Therefore, the sale was a matter of public record and it should not have taken 2 years to learn the identity of the Vang Defendants.

The Plaintiffs' reasons for not serving the moving party are insufficient. Regardless of why and when they served the Vang Defendants, it should not have taken another two years to serve the moving party. Again, the statute relied upon by the Plaintiffs states: "(f)ailure to discover relevant facts or evidence is not a cause beyond the plaintiff's control . . ." [CCP § 583.240(d)] Where summons and complaint are not served within the 3–year period, or returned with proof of service within 60 days thereafter, "the action shall be dismissed . . ." [CCP § 583.250(a)(2)] The motion will be granted. The dismissal is without prejudice to refiling the action against the dismissed defendant. [See CCP § 581(h)]

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 10/21/14.
(Judge's initials) (Date)